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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j) of the
Communications Act Competitive Bidding

PP Docket No. 93-253

COMMENTS OF COMCAST CORPORATION

Leonard J. Kennedy
Laura H. Phillips
Richard S. Denning

Its Attorneys

DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Washington, D.C. 20037
(202) 857-2500

November 10, 1993

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SUMMARY

Comcast Corporation supports the Commission's efforts to establish rules for the application of competitive bidding to the assignment of radio spectrum qualifying for this treatment under the revised Section 309 of the Communications Act. Comcast believes that ultimately the sequential electronic bidding method for auctioning spectrum is optimal, provided adequate systems and safeguards exist. However, oral bidding should be implemented for auctioning PCS licenses to the highest bidder in each BTA and MTA market.

Comcast does not support the utilization of combinatorial bidding for the aggregation of MTAs into a nationwide award. Permitting combinatorial bidding at this level will result in severe market inefficiencies and prevent parties who most value a given license from obtaining it. Comcast recommends that strict safeguards be instituted if combinatorial bidding is adopted.

Comcast also recommends that the Commission adopt specific rules to prevent creative reclassification of service offerings to avoid application of competitive bidding. Further, Comcast opposes the application of the Commission's proposed auction procedures to SMR and point-to-point microwave spectrum because this spectrum is unsuitable for auctions and does not fall within the statutory auction framework.

Comcast urges that no engineering or site specific technical data be required for filing prior to the issuance of license awards. Moreover, multiple applications should not be mandated when the same bidding participant is bidding on identical blocks within a given market. Finally, while Comcast is in favor of

the Notice's proposal to collect substantial upfront payments from auction participants, a 90-day refund policy should be adopted for the return of the upfront payments to unsuccessful auction participants.

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Comcast Corporation ("Comcast"), by its attorneys, hereby submits its comments on the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking to implement provisions of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") which granted the Commission explicit authority to use competitive bidding to issue radio spectrum licenses.^{1/}

I. INTRODUCTION

Comcast supports the Commission's efforts in this proceeding to develop a detailed framework for the application of competitive bidding to the assignment of radio spectrum. Because the appropriate process is, in a large part, dependant on the particular spectrum and licenses to be auctioned, it is very difficult to assess the impact of potential auction procedures for each service potentially covered by the Commission's auction authority. Accordingly, Comcast has focused these comments primarily on the proposed rules and procedures applicable to the

^{1/} See Notice of Proposed Rulemaking, PP Docket No. 93-253 (FCC 93-455), adopted September 23, 1993, released October 12, 1993 (the "Notice").

auctions for Personal Communications Services ("PCS") licenses, the first service the Commission will auction.

As a diverse telecommunications company, Comcast is committed to the deployment of new communications services and has taken an active role in the development of new telecommunications technologies, including PCS. Since 1991, in addition to its extensive investments in cable, cellular, competitive access providers, and specialized mobile radio, the company has dedicated significant resources to PCS experimentation, conducting propagation tests in the 1850-1990 MHz range and developing and demonstrating equipment necessary to achieve cable/PCS and cable/cellular interfaces. In addition, Comcast has participated in various rulemaking proceedings before the Commission addressing issues critical to the future deployment of PCS.

II. THE AUCTION PROCEDURES DESIGNED FOR PCS MUST BE MODIFIED IF A COMPETITIVE PCS MARKETPLACE IS TO BE ENCOURAGED.

Comcast believes that the Commission's proposed bidding methods for PCS spectrum must be modified to better promote the objectives specified in Section 309(j)(3) of the Communications Act.^{2/} As currently proposed, the PCS

^{2/} The objectives include (1) the development and rapid deployment of new technologies, products and services; (2) the promotion of economic opportunity and competition by ensuring that licenses are disseminated among a wide variety of applicants; (3) recovery for the public of a portion of the value of the public spectrum made available for public use; (4) the avoidance of unjust enrichment through the methods employed to award the licenses; and (5) the efficient and intensive use of the electromagnetic spectrum.

auction bidding procedures will cause market inefficiencies that will prevent the rapid deployment of new and innovative PCS services.

A. Once Developed, Electronic Bidding will be the Optimal Method for Auctioning Spectrum.

Comcast believes that, subject to the implementation of adequate systems and procedural safeguards, electronic bidding will be the solution to efficient spectrum auctioning. Electronic bidding will allow bidders throughout the United States to monitor the bidding process from their offices and instantaneously submit bids, reducing the inevitable logistical problems that arise when numerous bidders must congregate in a particular geographic location. In addition, bidders will be able to consult their records quickly, and instantaneously compare and evaluate bid changes with company-generated valuation information and act immediately upon this knowledge.

Comcast agrees with the Commission, however, that given the short time available to implement auctions, oral bidding is the most efficient method by which to auction PCS licenses. As found in the Notice, oral bidding will allow a party that values a license most to obtain the license. Oral bidding also will facilitate service deployment by ensuring that a bidder willing to outbid all competitors will acquire the spectrum license. Further, oral bidding has been found to incur lower private costs by avoiding the need to make complex value estimates and is regarded as a fair and open process.^{3/} In addition, oral bidding

^{3/} See Notice at ¶37.

obviates the need to set spending limits on bids because bidders can monitor their expenditures directly. In the round of PCS auctions scheduled for the Spring of 1994, oral bidding should be the primary bidding method.

In connection with the oral bidding process, the Commission should consider the possibility of establishing an auction-site computerized system through which to conduct these initial auctions. The use of keypads that permit auction participants to manually "punch in" bids could simplify and improve the bidding process. This form of computerized sequential "oral" bidding ensures all participants equal access to the bidding process and provides a uniform bidding environment for all participating bidders.

**B. A Combined Auction Procedure of Oral and Sealed Bids
Should Not Be Applied to PCS Auctions at the MTA Level.**

The Notice proposes a combination of oral and sealed bids for the auction of PCS licenses for MTAs. Under this dual bidding approach, sealed bids would be tendered several days in advance of the oral auction. After the oral bidding, sealed bids that were not withdrawn would be opened.^{4/} If a sealed bid for a combination of MTAs exceeds the sum of winning bids for the markets individually, the license would be awarded to the sealed bidder.^{5/}

4/ The Notice does not address the more general issue of voluntary pre-auction withdrawals. Comcast suggests that all application fees and upfront payments be fully refunded to the withdrawing entity up through the day before the auction.

5/ The Notice also requests comment on the desirability and feasibility of a shoot-out auction between the winners of the sealed and oral bidding. Comcast does not support this proposal.

Comcast opposes the proposed combinatorial process for a number of reasons. First, because the Notice contemplates that bidders will be free to bid both in sealed and oral form, the use of dual bidding methods will not reduce the number of oral bidders participating in the PCS auctions nor will it simplify or streamline the auction process. The adoption of two bidding methods, rather, will increase the number of bids made, thereby complicating the bidding process.^{6/}

Second, unless the Commission specifically identifies in a pre-auction Public Notice the scope of predesignated markets for combinatorial bidding, the auction process will become impossible to manage. Permitting auction participants to create their own markets by aggregating any combination of licenses into a "service area" will result in incomparable combinations. The Commission will be asked to award licenses on bids that reference highly distinct markets which will be impossible to evaluate and compare. It is critical that if the Commission provides for combinatorial bidding it predesignate the markets that can be aggregated in order to permit the grant of a final license award.

Third, the combinatorial bidding method, in effect, allows large bidders and consortia to average out their costs of acquiring large markets while

^{6/} Because more densely populated markets are likely to be highly valued, there exists a strong possibility that sealed bidders ultimately will begin bidding against themselves. For example, if an oral bid for spectrum within a highly desirable geographic service area exceeds the allocation to that market under the sealed bid, the sealed bidder will be forced to enter the oral bidding for the desired license rather than lose a key market. This predictable behavior only complicates the bidding process and undermines any promised benefits of a combinatorial bidding scheme.

artificially increasing the costs of less popular markets. In either event, the combinatorial bidding method disadvantages the bidder who values an individual market the most. This is particularly unfair given the combinatorial bidder's unfettered ability to sell unwanted markets once acquired, increasing the costs of bringing service to smaller markets.

Fourth, even if a PCS bidder is successful in obtaining a nationwide award pursuant to the combinatorial process, the provision of nationwide service is not guaranteed. If sealed bidders are determined to capture a national market, the proposed auction procedures may cause them to over-extend their resources, ultimately precluding their participation in the provision of PCS. It is equally conceivable that the nationwide bidder would quickly sell off licenses in markets that it is not interested in developing, exploiting the demand for markets once the auction is completed and participants have evaluated the opportunities presented by the licenses they have obtained.^{7/} These companies or consortia may fulfill all pre-auction qualification financial and regulatory requirements without any intention of building a nationwide system that provides ubiquitous service.^{8/}

^{7/} Because the Commission would issue 51 MTA licenses to a successful nationwide bidder, the nationwide winner is likely to resell a portion of its licenses to the highest oral bidder for markets it is not immediately prepared to develop. This license arbitrage would appear to delay the process of putting the license into the hands of the entity that most values it.

^{8/} Licensing PCS on a grand scale at the outset will also create a service deployment problem as nationwide award winners develop highly populated, lucrative market segments first, leaving rural or less attractive market segments unserved.

In the alternative, a successful combinatorial bidder may be willing to forfeit a single MTA license which it does not consider valuable by failing to meet relevant construction benchmarks. Without regulatory safeguards to prevent nationwide licensees from picking and choosing the markets to be resold or developed, the proposed benefits of nationwide licenses resulting from combinatorial bidding will be lost. Instead of aggregating upward to form larger markets, a time-tested, efficient and market-strengthening course, the combinatorial aggregation of MTAs may simply lead to uneconomical resale, service delays, license forfeitures, poor network build-out and post-auction market disassemblies.

Finally, Comcast believes that presenting the option of a nationwide award by bidding on MTAs in the combinatorial bidding process will encourage bidding on unnecessarily large regions, without the opportunity to explore smaller, more manageable markets first, and then expand operations. In the hopes of capitalizing on economies of scale, auction participants may pursue combinatorial bids and find that consumer acceptance of their newly marketed service is less than expected.^{9/}

Comcast submits that it is preferable that the highest winning qualified bidder in each MTA market be awarded the license. Only if an individual auction participant wins in each individual market should a de facto nationwide award be

^{9/} Regardless of the optimistic estimates of PCS demand, there still exists a level of risk in that the future development of the PCS marketplace is unknown.

issued. This procedure will avoid the problems associated with nationwide combinatorial bidding as discussed above, without disallowing PCS providers from serving broad geographic areas if it is feasible. Comcast believes that in many markets more localized or regional companies will place a higher value on the PCS licenses. By permitting subsequent aggregation of MTAs only in the after-market, the Commission will ensure that service areas are quickly developed and PCS service providers are capable and ready to deploy PCS efficiently.

In the event that the Commission adopts a form of combinatorial bidding, Comcast believes that combinatorial bidding on pre-designed market combinations requires strict rules to prevent unjust enrichment and other dislocations that do not serve the public interest. Because the public may be deprived of service while nationwide or supra-regional licensees develop service in other markets, these licensees must assume a risk of license loss commensurate with the scope of their ambitions. Failure to construct in any individual market, therefore, should result in the loss of all PCS licenses in all markets.

Further, if the combinatorial licensee quickly seeks to resell individual licenses in markets that it does not intend, and perhaps never intended, to develop, license transfer applications should not be approved without financial consequences that discourage manipulation of the Commission's auction procedures. The Commission's auction rules should provide that the seller pay the Commission the difference between the agreed upon sale price and any bid submitted by an individual market bidder who was willing to pay a higher price

when the auction was conducted, but lost in the combinatorial bidding process.^{10/}

C. Combinatorial Bidding Should Be First Tested In the PCS BTAs Within an MTA.

To the extent that the Commission wishes to test a dual method auction utilizing combinatorial bidding, Comcast recommends that the Commission first test combinatorial bidding for all PCS BTAs in a particular MTA. This method avoids many of the shortcomings identified in nationwide competitive bidding because it allows combinations only of pre-defined markets of reasonable but not excessive size (e.g. all BTAs within an MTA). In addition, permitting aggregation of BTAs to broader geographic markets at the outset will be more likely to reduce transaction costs incurred by post-auction transfers.

In addition, because the Commission has already provided for two MTA licenses in each market, use of this form of predesignated combinatorial bidding, permitting the aggregation of BTAs to the MTA level, establishes parity among "regional" license holders. The result will be more rigorous competition in the PCS marketplace and the enhancement and diversification of the services provided.

^{10/} Comcast agrees that the Commission might consider the same policy with respect to "designated entity" licenses. In both instances, the Commission should prevent post-auction transfers that undermine the policies supporting the Commission's rules.

D. Licenses Should Be Offered Sequentially, Auctioning Markets in Descending Order of Population.

Comcast believes that bidding parties will be in the best position to make informed judgments during the auction process if the Commission uses sequential ascending bid auctions, beginning with the most populous MTAs and moving to the least populous in descending order. The application of this method would permit auction participants to consider earlier results before bidding on subsequent markets.^{11/} Further, all available spectrum blocks in a particular market should be auctioned before the Commission proceeds to auction any spectrum blocks in the next most populous market.

III. THE COMMISSION MUST ADOPT SPECIFIC RULES THAT WILL PREVENT CREATIVE SERVICE RECLASSIFICATION IN CONTRAVENTION OF THE ESTABLISHED COMPETITIVE BIDDING CRITERIA.

In order for competitive bidding to occur, Section 309(j)(2) of the Communications Act requires that the principal use of the spectrum "involve, or be reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation."^{12/} Recognizing that the regulations governing a number of radio services allow applicants to choose whether to provide service to themselves, to subscribers for compensation, or both, the Notice proposes the adoption of a "principal use" test. In applying this test, the

^{11/} As recognized by the Commission, it is more useful to most bidders to know which big markets they have won before bidding on smaller markets. See Notice at ¶53.

^{12/} See Notice at ¶30.

Commission will determine whether the use of a service or class of service, by "average users or by the majority of users" within a service, constitutes "private service."^{13/} If so, the entire service or class of services would be exempt from the competitive bidding procedure.

Comcast is concerned that the application of the principal use test to certain private land mobile or operational private fixed microwave services, for example, will permit those entities who desire to sell radio capacity to third parties to avoid competitive bidding procedures by seeking a spectrum license in a service whose principal use is deemed to be private. Although the Commission has expressed an intention to scrutinize the structure of proposed service offerings,^{14/} without specific procedures to monitor and evaluate applications, services that would otherwise be provided on auctioned spectrum may be provided on spectrum that is not auctioned. Unless additional precautionary steps are taken, the proposed principal use analysis could result in disparate treatment of functionally similar services in contravention of Section 332 of the Communications Act.

Comcast suggests, for one, that the Commission base its "private service" determination on the amount of traffic that is utilized for non-commercial use rather than on the use of average users or a majority of users, as proposed. A

^{13/} Private service is defined as services without paying subscribers.

^{14/} See Notice at ¶32 n.15. No procedure has been proposed to conduct this analysis.

rule that establishes a minimum threshold below which a spectrum use will be deemed "private" will be clear and easy to apply.^{15/}

Further, unless costs of service are equalized in some way, those license holders who paid an auction price will be at a severe competitive disadvantage as they compete with "partial" commercial service providers who, under the proposed rules, have received their spectrum cost-free. Comcast recommends that the Commission adopt rules requiring that licensees making any commercial or "excess" capacity available to third parties be charged the value of the spectrum for its use.

IV. AUCTIONS FOR SPECIFIC SERVICES

Comcast agrees that the Commission has the requisite statutory authority to implement competitive bidding when it assigns or reassigns blocks of spectrum for the development of new services to the public.^{16/} The Notice's proposed application, however, of competitive bidding to certain distinct, pre-existing radio services is dubious and creates far more complications than benefits. In certain circumstances, the Notice proposes "shoehorning" auctions into existing

^{15/} The character of an operator's use of spectrum should be reviewed when the applications are filed and subsequently renewed.

^{16/} The use of 2 GHz spectrum for the delivery of PCS services will most likely satisfy the Commission's competitive bidding requirements. Auctions for licenses of radio spectrum are permitted whenever (a) mutually exclusive applications are accepted for filing, (b) for initial licenses or construction permits, (c) to provide services to paying customers. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(j)(2), 107 Stat. 312, 388 (1993) (Section 309(j)(2) of the revised Communications Act).

services that would be better licensed, regulated and maintained under presently established procedures.

A. SMR Spectrum in the 800 MHz Frequency Band Does Not Fall Within the Commission's Competitive Bidding Authority.

As an investor in SMR operations,^{17/} Comcast believes that spectrum within the 800 MHz frequency band utilized for the provision of SMR services may not be subjected to competitive bidding.^{18/} Most 800 MHz SMR spectrum is already assigned. Auctioning spectrum that is surrendered or forfeited by failure to satisfy construction or loading requirements is inconsistent with long-standing Commission waiting list rules and the finder's preference policy.

In October 1991, the Commission adopted application of a finder's preference to SMR-category channels.^{19/} The finder's preference program facilitates the recovery of underutilized channels and provides incentives for licensee self-policing.^{20/} When the Commission decided to extend the finder's preference policy to SMR services, it also confirmed the use of waiting lists for

^{17/} Comcast presently holds an ownership interest in Nextel Communications, Inc. and in other SMR providers.

^{18/} Comcast takes no position on the Commission's statutory authority to auction 900 MHz spectrum below the top 50 Designated Filing Areas currently subject to a rulemaking proceeding. See First Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1469 (adopted January 14, 1993).

^{19/} See Report and Order, Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, 6 FCC Rcd 7297, 7304-05 (adopted October 24, 1991).

^{20/} Under the program, "finders" who offer assistance in the recovery of channels are given a dispositive "preference" to become licensed for the recovered channels.

800 MHz channels, finding them to be an effective means for reassigning SMR frequencies.^{21/} Further, the Commission confirmed that the waiting list procedures provided an orderly assignment mechanism and limited the number of frivolous claims by prospective applicants.^{22/}

The application of competitive bidding to this existing regulatory framework for the assignment of SMR channels will necessitate the overhaul of a process that only recently has been reassessed and improved. Further, because SMR channels within the 800 MHz band have largely been assigned, valuable resources would be wasted modifying a structure that is well-suited to the efficient utilization and maintenance of this spectrum.^{23/}

In addition, under SMR waiting list procedures, SMR applications are not mutually exclusive. This raises the question whether SMR spectrum falls within the category of spectrum designated for competitive bidding.

B. Point-to-Point Microwave Services

Likewise, Comcast opposes imposition of competitive bidding in the context of particular intermediate links used to deliver services to the public, such as Point-to-Point Microwave Services. These frequencies have never been

^{21/} Id. at 7305.

^{22/} Id. at 7305.

^{23/} It must be recognized that the Commission's prior aggregation rules applicable to these frequencies would be displaced completely in a competitive bidding environment. Moreover, the application of the Commission's auction procedures in this context will increase exponentially the number of auctions to be conducted if present channel assignment procedures are maintained.

assigned as block assignments. Point-to-point microwave paths, for example, are assigned in single, discrete channels making the rendition of widespread service to the public difficult, if not impossible. In addition, the prior coordination process required under the Commission's point-to-point microwave rules assures that there are no mutually exclusive applications for which an auction could be held.^{24/}

Although the Notice correctly states that point-to-point microwave has been traditionally been used for basic telephone network services (voice, data and video traffic), and more recently to connect cells within a cellular system, the fundamental mutual exclusivity requirement for the application of competitive bidding is lacking. Unlike the demands anticipated for PCS spectrum, spectrum applicants do not "compete" for these channel bands.

Finally, conducting auctions in this context could attract speculators that would seek to sell licenses to existing operators, delaying service to the public and inflating cellular and other service costs without any public benefit. Even more troubling, speculators will be capable of blocking the availability of frequencies for the expansion of presently-offered services, denying current operators the critical ability to respond to growing service demands.

^{24/} The rules require that frequency coordination be used to prevent the filing of mutually exclusive applications. The public notice of microwave applications is not intended to give notice of applications for purposes of establishing a mutually exclusive application "cut-off" window, but rather to permit existing microwave licensees an opportunity to review pending applications to ensure non-interference. See 47 C.F.R. §§ 21.700-21.711.

V. THE PROPOSED APPLICATION PROCESS IS ADEQUATE AND ONLY REQUIRES FURTHER REFINEMENT.

Comcast supports the Notice's general proposals for applications, bidding and licensing requirements, including the requisites of pre-auction public notice and the tendering of substantial upfront payments. A number of the proposed auction procedures, however, should be clarified.

The Notice requests comment on requiring auction applicants to file short and long-form applications contemporaneously. Although Comcast supports this proposal, the Commission's rules should clarify that engineering and site specific information need not be submitted prior to the auction. Such a requirement would unnecessarily burden auction participants who would be compelled to investigate and analyze potentially difficult technical issues in many markets, without any guarantee that they would be the highest bidder and be awarded the desired licenses. This exercise would be extremely wasteful of resources without any obvious benefit. Although the recently adopted PCS rules do not appear to contemplate that engineering information will be required at such an early stage, Comcast requests that the Commission's rules make this plain.^{25/}

Comcast, however, does recommend that the Commission require that auction applicants confirm that appropriate wireless engineering expertise

^{25/} Comcast agrees that the short-form applications be screened according to the letter-perfect standard. Given the importance of ensuring that every auction participant has satisfied all relevant regulatory and financial requirements, the short-form applications must be complete and accurate.

(internal or external) will be available to conduct the necessary technical studies and subsequently present a specific engineering and frequency reuse plan for PCS implementation if the desired licenses are won. This requirement would ensure that bidding entities have at least consulted with an engineer to assess the particular technical issues arising in the markets to be auctioned. The Commission should provide a reasonable period time for the submission of more detailed engineering and site information after the PCS auctions are concluded.

Further, the proposed auction rules do not appear to address the issue of whether bidding parties must submit multiple applications to qualify to bid on identical spectrum blocks. For example, it is not clear whether an auction participant must submit a second application for Block B, if they fail to obtain Block A spectrum. Comcast recommends that auction participants who submit bids on Block A spectrum (30 MHz) be viewed as automatically bidding on Block B (also 30 MHz), if their initial Block A bid is unsuccessful. Similarly, one application should be required for the two "designated entity" set aside blocks and one application for the three remaining 10 MHz blocks. This accommodation will reduce the number of filings made under the Commission's rules and would promote efficiency in the application process.^{26/}

^{26/} This assumes that all information contained in the application for Block A bidding would also be required for Block B bidding. If this is not the case the auction rules must make clear whether individual, distinct applications must be filed for each frequency block within a market.

The Commission should also adopt substantial upfront payments as a qualifying factor for participation in the competitive bidding process. This requirement will confirm the auction participant's intention to utilize the spectrum for PCS, deter speculative parties from participating in the auction, and thereby reduce the prospect that post-auction transfers or forfeitures will occur.

If, however, regardless of the established safeguards, the winning bidder is determined to be unqualified to hold the license, Comcast recommends that the Commission retain the upfront payment and award the license to the next highest bidder that meets all relevant qualification standards.^{27/} This review of qualifications should be performed on the second and then the third highest bidder, until the third highest bidder is found not to qualify. Once this occurs, the Commission should conduct a second auction to determine the final license winner.

Finally, the Commission should provide refunds of upfront payments to unsuccessful bidders within 90 days after the auction is concluded. If the payments are held for a period exceeding 90 days, the Commission should reimburse the auction participant the upfront payment with interest.^{28/}

^{27/} The Commission should impose a reasonable time limit of perhaps 90 days on its qualification review.

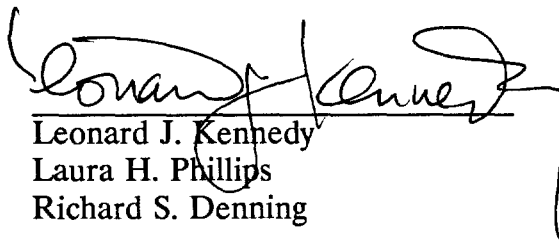
^{28/} If, however, the initial license winner is subsequently disqualified and the second and third highest bidders remain potential license winners, the Commission may extend the return of these participants' upfront payments an additional 90 days.

VI. CONCLUSION

Comcast generally supports the Commission's efforts to establish rules for the application of competitive bidding to the assignment of certain radio spectrum. Comcast is concerned, however, that a number of proposals identified in the Notice will create market inefficiencies and prevent the swift deployment of PCS technologies. Comcast, therefore, requests that the Commission adopt the recommendations discussed above in order to facilitate the competitive bidding process and promote a healthy, competitive and innovative PCS marketplace.

Respectfully submitted,

COMCAST CORPORATION



Leonard J. Kennedy
Laura H. Phillips
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Its Attorneys

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